The Goodyear Tire & Rubber Company *and* James Talley

Local No. 12, United Rubber, Cork, Linoleum and Plastic Workers of America, AFL–CIO *and* James Talley. Cases 10–CA–26301 and 10–CB–6043

January 31, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

On July 14, 1993, Administrative Law Judge Richard J. Linton issued the attached decision. The Respondent Employer and the Respondent Union filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The central issue in this case is whether the Respondent Employer and the Respondent Union violated the Act by refusing to allow Charging Party John Talley to bump department representative (i.e., Union Steward) David Bowers from his position. We find, contrary to the administrative law judge, that the Respondents have not violated the Act as alleged, because the Respondents have provided the evidence necessary to show that the application of the relevant superseniority clause to protect Bowers from being bumped is justified.[1]

I. FACTS

In July 1992 Talley attempted to bump Bowers from his position on the third shift. Bowers had less seniority than Talley. Because Bowers was a steward, the Employer and the Union said the collective-bargaining agreement's superseniority provision protected him from being bumped.

The contract provides that an individual who is bumped is "declared surplus labor and sent to the Labor Department." This provision means that a bumped individual is no longer considered assigned to the shift and department in which he was working. The Employer and the Union agree that if a steward could be bumped from his job, he would not be able to continue serving as steward because he would not be in the department. The contract also provides, however, that a steward "shall have seniority preference in the department on the shift on which he is selected, except in the case of layoff." The Employer and the Union agree that this provision means that a steward cannot be bumped, except in layoffs.

II. LEGAL PRINCIPLES

In *Dairylea Cooperative, Inc.*, 219 NLRB 656, 658 (1975), enfd. 531 F.2d 1162 (2d Cir. 1976), the Board held that a superseniority clause not limited to layoff and recall is presumptively unlawful, but a party asserting such a clause's legality may rebut the presumption by showing that providing such superseniority furthers the effective administration of the bargaining agreement on the plant level. Simply asserting that superseniority will further effective representation will not rebut the presumption. *Laborers Local 380 (Mautz & Oren)*, 275 NLRB 1049 (1985) (respondents failed to introduce evidence to support contention that steward presence on the job at all times was required and therefore failed to justify superseniority for Saturday overtime). Where the facts warrant, however, the Board has found the presumption rebutted. *Auto Workers Local 1331 (Chrysler Corp.)*, 228 NLRB 1446 (1977) (respondents introduced evidence showing need for presence of steward on the job at the time employees were working and therefore justified superseniority for overtime). The Board has recognized that the continuous presence of the same steward on the job is a legitimate justification for superseniority. *Union Carbide Corp.*, 228 NLRB 1152 (1977).

III. ANALYSIS

The record shows that there are on the average from 75 to slightly more than 100 bumps each month, that each bump sets off a complex chain reaction that results in an average of 6 more employees being bumped, and that it can take up to 2 weeks for the chain reaction to be completed. If a steward were bumped, he would be unable to serve as steward until, at the earliest, the completion of the chain reaction, when he would regain a department assignment. Although the steward might return to the same shift and department after the bumping process was completed, he might not, and even if he were ultimately to return as a steward, his uncertain status in the interim would lead to confusion about whether a temporary steward

[1] Although we agree with the result our concurring colleague reaches, we cannot agree with his rationale. According to our colleague, the inference that superseniority for appointed stewards encourages union membership should not apply when stewards are elected. The inference about appointed stewards accepts that an individual must display attributes attractive to union officials under an appointment process. But an individual must display attributes attractive to fellow employees under an elective process. We fail to understand how we can say a system that may cause an individual to ingratiate himself to union officials (who are themselves elected by fellow employees) is encouragement of union activism, while a system that may cause an individual to campaign for union office with fellow employees is not encouragement of union activism.

needed to be appointed or a new election was necessary.[2] During the bumping process, the Union would have to decide whether to appoint a temporary steward, who might not become the permanent steward if the bumped steward returned or employees decided to seek an election within 60 days.

In our view, this evidence demonstrates that if Bowers were bumped, a great deal of uncertainty would result. The chain reaction following a bump places other unit employees' status in doubt while the consequences of the bump are being determined. If a steward were bumped, continuity of representation for unit employees would be disrupted at a time when the employees particularly need the expertise of the person they have selected to represent them in grievances and help them protect their contractual rights.

The judge suggests that continuity of representation would not necessarily be disrupted because the parties could agree that the bumped individual would remain as steward until the bumping process is completed or an alternate steward could be appointed. We believe the judge's suggestions miss the mark.

First, we believe that even if a bumped steward retained his position during the bumping process, the steward's ability to represent effectively the employees in his department would be severely undermined. As observed above, the bumping process is a critical time for department employees, when they would most want strong, effective representation. If, however, a steward were allowed to be bumped, his job status would remain uncertain during the bumping process, and if he remained the steward during this time, the uncertainty regarding his own job status could affect his actual or perceived ability to represent effectively the other employees in his department. Further, if an alternate steward were appointed, that appointment might be temporary because the appointed employee may subsequently be bumped, the bumped steward may regain a department assignment, or the department employees may seek an election.[3] Thus, contrary to the judge, we find that in either situation suggested by the judge, effective representation for the unit employees cannot be ensured.[4]

Second, and perhaps even more significantly, we believe that once the Respondents have shown sufficient evidence to justify their application of the superseniority clause, the fact that there might be other approaches is irrelevant. In *Consolidated Freightways*, 302 NLRB 984 (1991), the parties used a clause granting superseniority for "other situations" than layoff and recall to give a steward shift preference over other employees.[5] The judge found a violation in the application of the clause because the steward did not select the shift that would give him greatest accessibility to employees. The Board reversed the judge because evidence showed that the shift the steward selected increased his accessibility, even though there were other shifts that would have increased his accessibility more. According to the Board

> It is sufficient, for *Dairylea* purposes, that superseniority was used to enhance the Union's ability to represent employees. The fact that it was not exercised to enhance that ability to the maximum extent possible does not render the exercise unlawful [302 NLRB at 985 (emphasis in original)].

We believe that the Respondents have shown that superseniority in this case avoids disrupting continuity of representation at a critical time, and we would also find that protecting Bowers from being bumped provides more effective representation than either of the judge's suggestions. A fortiori, we would conclude that "[i]t is sufficient, for *Dairylea* purposes, that superseniority was used to enhance the Union's ability to represent employees."

ORDER

The complaint is dismissed.

CHAIRMAN GOULD, concurring.

I join my colleagues in dismissing the complaint. I do so, however, because the stewards are elected[1] and I believe the rationale of *Dairylea Cooperative, Inc.*,[2] a case which dealt with superseniority for union-appointed stewards, should not be extended to the instant circumstances, which involve the contractual granting of superseniority to department representatives (i.e., stewards) who were elected by dues-paying members of the Union.

[2] Stewards are elected by employees in the departmental shift they represent. The Union may appoint a steward in the event of a vacancy, but if the employees are not satisfied with the steward, they have 60 days in which to call for an election.

[3] Additionally, the uncertainty of the bumped steward's status makes the appointment of an alternate and the decision whether to seek an election confusing at best.

[4] We recognize that the Board has found unlawful the use of superseniority to allow a steward to retain a particular job. The *Dairylea* presumption, however, is not irrebutable. In no case of which we are aware have respondents demonstrated that removing a steward from a particular job necessarily would place him in a temporary and uncertain status for an indefinite period of time. It is for this reason that we find such cases as *Joy Technologies*, 306 NLRB 1 (1992), enfd. 990 F.2d 104 (3d Cir. 1993), and *Mechanics Educational Society Local 56 (Revere Cooper)*, 287 NLRB 935 (1987), distinguishable.

[5] The "other situations" were restricted to those that "assure[d] the Steward greater accessibility to co-workers."

[1] The record shows that such elections may be held only when a majority of dues-paying members are present and voting. Although the chief steward of a division may appoint a department representative, the appointee may not become the official representative unless the members do not call for an election within 60 days of the appointment.

[2] 219 NLRB 656 (1975), enfd. 531 F.2d 1162 (2d Cir. 1976).

The principle rationale of the majority position in *Dairylea* is that the broad superseniority clause at issue in that case unlawfully encourages union activism by reserving top seniority for stewards whom the union appoints. The majority stated: "[V]iewed realistically the only way a unit employee can gain such preference to on-the-job benefits is to be a good, enthusiastic unionist and thereby through such actions recommend himself to the union hierarchy for appointment to the office of steward."[3] On review, the Court of Appeals for the Second Circuit placed special emphasis on the fact that the union controlled the appointment of the stewards. Noting that although there was no evidence in the record demonstrating a relationship between the extent of a worker's union activity and his likelihood of being selected a steward, the court found that the Board could properly infer from the record that union membership would be encouraged by the superseniority provision. The court stated: "The steward is the Union's representative in the plant selected solely by—and within the unlimited discretion of—the Union. . . . It is hardly unreasonable for the Board to infer, absent evidence to the contrary, that the Union will, for so sensitive a post, take care not to select someone who has not demonstrated loyalty to the Union."[4]

The instant case does not provide the same ground for the Board to infer that the grant of superseniority to department representatives will encourage union membership. The representatives are elected. Their selection is not within the unlimited discretion of the Union. Thus, in order to gain superseniority, they would have to incur the favor of and "demonstrate [] loyalty" to their fellow employees rather than to the union as in *Dairylea*. In such circumstances, I find that under *Dairylea* it is not reasonable to infer, without evidence to the contrary, that a broad grant of superseniority to elected stewards unlawfully encourages union membership.[5]

As my colleagues note, superseniority for elected stewards encourages activism to the extent that an employee may be more inclined to seek election as a steward if the steward has superseniority. The prospective steward, however, is beholden to the employees for their selection, and thus is encouraged to represent the employees in a manner acceptable to them. In any number of circumstances, the candidate for office may be in full opposition to and engaged in an attack on the established union hierarchy. It is difficult to see why superseniority for such elected union stewards would encourage unionism in the sense contemplated by *Dairylea* under the Act.

But, in any event, to the extent that the prospective steward is encouraged to show loyalty to the union hierarchy as well, such loyalty would be incidental to the loyalty to his fellow employees. I see nothing unlawful with encouraging such activism. Appointed stewards, on the other hand, are primarily beholden to the union hierarchy for their selection, and are thus encouraged to support that hierarchy, even in circumstances where such support would not necessarily reflect the views of the steward's fellow employees. In my view, such encouragement of union activity is impermissible.

To the extent that other decisions of the Board have extended *Dairylea* to circumstances involving elected stewards, I find the reasoning of those decisions unpersuasive and would overrule them.[6]

[3] *Dairylea Cooperative, Inc.*, 219 NLRB at 657.

[4] *NLRB v. Teamsters Local 338*, 531 F.2d 1162, 1166 (2d Cir. 1976). The Board's determination of whether a particular superseniority provision is lawful will be enforced upon review "if it is reasonably defensible, even if [the reviewing court] might prefer a different interpretation" and "should be reversed [on review] only if it has no reasonable basis in law." *NLRB v. Niagara Machine & Tool Works*, 746 F.2d 143, 148 (2d Cir. 1984). Accord: *Auto Workers Local 1384 v. NLRB*, 756 F.2d 482, 486 (7th Cir. 1985) (Board determination of lawfulness of superseniority overturned only if irrational or inconsistent with Act). Further, "[e]nforcement [of a Board superseniority rule] reflects only a determination by the court of appeals that the rule is rational and consistent with the Act, not that it is the uniquely correct rule." *Auto Workers Local 1384 v. NLRB*, 756 F.2d at 492.

[5] See *Stage Employees Local 780 (McGregor-Werner, Inc.)*, 227 NLRB 558, 559 (1976).

[6] See, for example, *Allied Supermarkets*, 233 NLRB 535, 535 fn. 1 (1977).

Frank F. Rox, Esq., for the General Counsel.
Sonja F. Bivins, Esq. (Mack & Bernstein), of Atlanta, Georgia, for Respondent Goodyear.
George C. Day Jr., Esq. (Wilson & Day), of Gadsden, Alabama, and *Charles R. Armstrong*, General Counsel (URW International), of Akron, Ohio, for Respondent URW Local 12.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This is a superseniority case. Agreeing with the Government, I find that Goodyear and Local 12 interpreted provisions in the collective-bargaining agreement (CBA) so as to exempt department representatives (DRs) (union stewards) from being bumped from their jobs by more senior employees even when the DRs could in turn bump into a job within their area of representation as DRs. By so interpreting the CBA and preventing James Talley from bumping DR David Bowers in July 1991, I find that Goodyear and Local 12 violated, respectively, Section 8(a)(3) and (1) and Section 8(b)(1)(A) and (2) of the Act. I order Goodyear and Local 12 to cease their unlawful interpretation. Goodyear must offer Talley the ticket job he would have obtained, retroactive to July 1991 for seniority and all other purposes, and Local 12 must notify Talley and Goodyear that it has no objection to that offer. There is no backpay because Talley has lost no money as a result of the unlawful prevention of exercising his bumping rights.

I presided at this 1-day trial on April 22, 1993, in Gadsden, Alabama, pursuant to the November 30, 1992 order consolidating cases, consolidated complaint and notice of hearing (complaint) issued by the General Counsel of the National Labor Relations Board (the Board) through the Regional Director for Region 10 of the Board. The complaint is based on charges filed October 13, 1992, by James O. Talley, an individual, against the Goodyear Tire & Rubber Company (Respondent Goodyear or Company) in Case 10–CA–26301, and against Local No. 12, United Rubber, Cork, Linoleum and Plastic Workers of America, AFL–CIO (Respondent Union, Local 12, or URW) in Case 10–CB–6043.

In the Government's complaint the General Counsel alleges that since July 1992, Respondent Goodyear has violated Section 8(a)(3) and (1) of the Act, and that Respondent Local 12 has violated Section 8(b)(1)(A) and (2), because Goodyear and the Union have interpreted and applied the collective-bargaining agreement (CBA) so as to prevent Charging Party Talley, "a more senior third shift General Maintenance Mechanic at the Gadsden, Alabama facility, from bidding into a position held by a less senior third shift employee solely because that employee was a department representative [a union steward] and notwithstanding the fact that the department representative would not be displaced from his shift." Thus, the Respondents "have unlawfully accorded superseniority to department representatives for purposes other than layoff and recall."

By their answers Goodyear and Local 12 admit certain allegations but deny violating the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Goodyear, and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

An Ohio corporation with a plant at Gadsden, Alabama, Goodyear manufactures tires. As the pleadings establish, during the past 12 months Goodyear shipped goods valued at $50,000 or more directly from its Gadsden plant to customers located outside Alabama. I find that Goodyear is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION INVOLVED

The pleadings establish, and I find, that Local 12 is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

1. Work force and witnesses

At its Gadsden plant, Goodyear makes tires for cars and trucks. (1:98.)[1] Since October 1984, E. Hill Mayfield has been manager of employment and EEO administration at the plant. Mayfield testified that the Gadsden plant employs some 2300 hourly and salaried workers. (1:81.) Some 2060 are represented by the Union and covered by the CBA. (1:60, 81.) In July 1992 the plant had 300 or so fewer employees. (1:60.) The work force is divided into four divisions, A, B, C, and E. (1:61.)

Joint Exhibit 1 is a copy of the collective-bargaining agreement. The CBA provides for an effective term of August 7, 1991, through April 23, 1994 (JX 1 at 2, 133). The pleadings establish that the current contract is the most recent of successive CBAs. The contractually recognized bargaining unit covers practically all employees other than managers and supervisors.

J. R. Countryman has been Local 12's president since October 1989, and before that he held other offices in the Union, including that of division chairman, to which he was elected in October 1974. Countryman has been a member of the Union since September 1964. (1:51–52.) As described in the record, and in the CBA (such as the article covering the grievance procedure), Countryman is assisted by employees holding various union offices. One of these offices is that of department representative, a position essentially the same as that of a steward elsewhere. The division chair, therefore, functions as the chief steward for his or her division. (1:34.) George T. Booker Jr. is the Union's chair for division E, the division covering Charging Party Talley. (1:34.) Division E has subdivisions. (1:62.) Departments, as such, are not well defined or described in the record. Talley testified that the divisions have been consolidated so that two remain, and that he is in division A. (1:15.) It is not clear whether "departments" and "divisions" are different terms for the same unit.

The four persons I have named are the witnesses who testified. The General Counsel rested after calling Talley and Booker. (1:49.) The Union (which took the lead for the Respondents) and Goodyear moved to dismiss the complaint. (1:49.) In denying the motion, I stated my understanding that they could rest on their motion or proceed to introduce evidence, but if they proceeded they, in effect, waived their motion because my decision then would be based on the entire record. (1:50.) *Greco & Haines, Inc.*, 306 NLRB 634 (1992). *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *Reed v. State*, 794 S.W.2d 806, 809 (Tex. Crim. App. 1990). The sufficiency of a prima facie case is tested by resting on a motion to dismiss. See, for example, *American Bakeries Co.*, 280 NLRB 1373, 1374 (1986). Proceeding rather than resting, the Union called J. R. Countryman, president of Local 12, and E. Hill Mayfield, Goodyear's manager of employment and EEO administration, and rested. (1:98.) Relying on the evidence presented, Goodyear also rested. (1:98.) The General Counsel called no rebuttal witnesses.

For a time the Board ruled that, in assessing whether the General Counsel had established a prima facie case, only the General Counsel's evidence would be considered. This line of cases began with *Hillside Bus Corp.*, 262 NLRB 1254 (1982). Under *Hillside Bus*, apparently even an admission by the respondent during the respondent's case-in-chief would not be available to help establish the General Counsel's prima facie case. The Board silently overruled the *Hillside Bus* line of cases in *Golden Flake Snack Foods*, 297 NLRB

[1] Unless otherwise indicated, all dates are for 1992. References to the one-volume transcript of testimony are by volume and page. Exhibits are designated GCX for the General Counsel's, RXU for the Union's, and JX for joint exhibits. Goodyear offered no exhibits.

594 fn. 2 (1990). *Electronic Data Systems Corp.*, 305 NLRB 219 (1991).

Recently the Sixth Circuit stated what appears to be the equivalent of the Board's old *Hillside Bus* rule. *NLRB v. Vemco*, 989 F.2d 1468, 1479 fn. 12 (6th Cir. 1993). I respectfully suggest that the Sixth Circuit's statement in *Vemco*'s footnote 12 does not express the correct procedural rule. *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 122–123 (5th Cir. 1992); *Reed v. State*, 794 S.W.2d 806, 809 (Tex. Crim. App. 1990).

2. Basic facts and party positions

Because the material facts are undisputed, resolution of this case will depend on application of the law. Two provisions of the CBA are at the center of the controversy here. Both appear in article X—seniority, which begins at page 64 of the CBA. A final, and unnumbered, topic under section 1 of article X is "Application Of Seniority" which begins at page 80. The last paragraph of the topic reads (JX 1 at 81):

> A Department Representative shall have seniority preference in the department on the shift on which he is selected, except in case of layoff. Division Chairman and Vice Chairman shall be given seniority and shift preference. Only actual service will be recognized in bidding and offering overtime or in transferring unless the use of actual service in making such transfer would result in shift or department displacement.

The other key provision is section 16—surplus labor. That section has two paragraphs. The first reads (JX at 99):

> The employee displaced by an employee exercising transfer privileges will be declared surplus labor and sent to the Labor Department with transfer privileges.

The second paragraph provides for exceptions. It reads (id.):

> Exception may be made where the employee's services are required to train his replacement or if, on the Employer's request, he elects to remain on the job for a period not to exceed four (4) weeks. If during that period a vacancy arises on the job, such vacancy will be filled by the surplus labor without posting. An employee so assigned shall be notified in writing at the time of the change, and a copy of such notice will be sent to the Division Chairman. A further exception may be made whereby the employee, on the Employer's request, agrees to remain on the job or another job. This, however, is subject to agreement with the Division Chairman. If an employee remains on a job after being bumped he will not gain experience after he was bumped.

A bump produces a "chain reaction" (1:29) or "domino effect" (1:58) so that one bump at the Gadsden plant will cause an average of some six more employees bumped. (1:58–59.) Bids and bumps follow different contract provisions. (1:23, 25, 28, 32, 63–65, 71.) Bids and bumps cause "labor moves," about 100 to 150 per month at the Gadsden plant. (1:67, 183; RXU 1.) About 75 percent of these moves result from bumps. (1:89.) Manager Mayfield's office is constantly processing labor moves. It is a time-consuming process, Mayfield testified. (1:85.) Each such move requires an average process time of about 15 to 30 minutes. (1:95–96.) To exercise a "transfer" privilege means to "bump" someone. (1:71–72, 81.)

In July 1992 Charging Party Talley, a general maintenance mechanic with a seniority date of July 10, 1967 (1:15), attempted to obtain the third-shift ticket position at the cement house, a job then held by David Bowers. (1:15–17.) Talley had more seniority than Bowers. (1:17.) Bowers, however, was a department representative (DR) for the Union. No DR at the Gadsden plant has ever been bumped. (1:42–43, 73–74, 76, 90.) Talley apparently would have "bumped" Bowers, based on seniority, as distinguished from bidding on a posted position.

This situation of no DR bumping prevails because the parties to the CBA have taken the position that the DR (the Union's steward) may not be bumped except in layoffs. (1:34–35, 54.) This interpretation flows from the fact that a bumped employee immediately becomes attached to the Labor Department as surplus labor. (1:37, 54, 81.) On becoming surplus labor, the bumped employee, were he a DR, would lose his DR status because he no longer would be part of the department he had been bumped from. (1:37–38, 41, 54–55.)

As stewards, DRs are elected by the employees in the department and the shift they represent. (1:44–45, 66.) Holding union elections is not a simple process, mainly because it is difficult for the Union to obtain the necessary participation. Work schedules, currently 12-hour shifts, contribute to the problem. (1:44–45, 58, 67.) Although on average the Union is able to conduct an election within 2 weeks of a call (1:69–70), elections must be decided by the vote of a majority of dues-paying members. (1:45.) That is, an election apparently is not decided by a majority of the votes cast.

The Union and Goodyear contend that allowing a department representative (DR) to be bumped would create chaos, because it would leave employees without their elected representative. However, the situation would be temporary. In the meantime, the division chair (chief steward of the division) would appoint an interim representative, possibly the existing assistant representative. (1:41, 44, 56, 77.) Thus, when a DR is off work for illness, the assistant DR fills in. (1:40.) If the members of that department and shift are well satisfied with the appointee, they even can skip an election. If they do not call an election within 60 days, the appointee becomes the official representative. (1:44.)

If a bumped DR has sufficient seniority and experience for the position, he or she may exercise it so as to remain on the same shift. (1:67, 76–78.) Moreover, while all the associated labor moves are being processed, the bumped DR temporarily could be assigned to a different shift. (1:48–68–69.) Goodyear attempts to move everyone in the engineering department at the same time. (1:36, 39, 96.) In practice, pending the move, bumped employees (or "surplus labor") remain in their jobs. There is no "labor pool" where they stand around waiting for work assignments. (1:46–47.)

B. *Requested Remedy*

Charging Party Talley, who appears to be about 62 to 63 years of age, seeks the third-shift ticket position because it involves less climbing and, therefore, there would be less stress to his knees. He wants that job and on the third shift. (1:16–17, 23.) As noted, Department Representative Bowers held the ticket position on the third shift, and Michael Wright did so on the second shift. Talley had more seniority than either, with Wright having more than Bowers. (1:17.) In turn, Bowers had more seniority than at least six others on the shift. (1:20, 35, 78–79.) Bowers, the DR, could have bumped and remained on the third shift. (1:35, 76, 77–78.) Manager Mayfield testified that in July 1991 Talley and Bowers were both part of "Engineering." (1:96.) Apparently Mayfield was referring to the engineering department.

During July–August 1992 both Goodyear (1:17–19) and the Union (1:22–23) told Talley that he could not bump the DR. Although disagreeing with their interpretation of the CBA, Talley bumped Wright on the second shift and, as of the hearing, held the ticket position on the second shift, although still desiring that position on the third shift. (1:16, 21, 23.) In September Bowers successfully bid on a (different) posted job. He remained on the third shift as the DR. (1:24.) Advising that no backpay is involved, the General Counsel seeks a remedial order requiring the parties to place James O. Talley in the position to which he was denied access in July 1992. (1:100.)

C. *Analysis*

1. Governing law

In *Dairylea Cooperative*, 219 NLRB 656, 658 (1975), enfd. 531 F.2d 1162 (2d Cir. 1976), the Board held that superseniority clauses not on their face limited to layoff and recall are presumptively unlawful, and the burden of rebutting that presumption (that is, establishing justification) rests on the shoulders of the party asserting their legality.

In 1983 the Board extended the presumption of lawfulness to defensive shift-protection clauses for shift stewards on the basis the clauses are akin to layoff protection. *Auto Workers Local 561 (Scovill, Inc.)*, 266 NLRB 952, 953 fn. 9 (1983). As the Board later wrote in *Electronic Workers IUE Local 663 (Gulton Electro Voice)*, 276 NLRB 1043, 1044 (1985):

> Bumping a zone steward to a job in another zone would disrupt the continuity in the first zone's employees' union representation. Therefore, granting a zone steward protection against bumping from his zone would be defensive in nature, and akin to the shift protection found lawful in *Scovill*. In contrast, the chief steward does not need to be on any particular job in order to perform her plantwide grievance-handling duties effectively.

The distilled principle of the shift and zone cases is that it is the steward's "area of representation" which is the key for grievance handlers. *Mechanics Educational Society Local 56 (Revere Copper)*, 287 NLRB 935, 936 (1987). However, "what is permitted is only the minimal exercise of such protection." Id. As *Revere Copper* held, that means a shift steward is entitled to protection on his shift, but is not entitled to keep a particular job so long as he is able to retain a job in his "area of representation." Id. at 937. The Board address to that rule. *Joy Technologies*, 306 NLRB 1 (1992), enfd. 990 F.2d 104 (3d Cir. 1993).

2. Discussion

Unlike in *Joy Technologies*, the complaint here does not allege that maintenance of the contractual provision is unlawful. Rather, the complaint attacks its interpretation and application by the Union and Goodyear. The interpretation of the parties to the CBA is that a DR (department representative, or steward) cannot be bumped except in layoffs, for to do so would remove him from his department by converting him or her to surplus labor. (The conversion is temporary and generally, in practice, the person remains in his or her job pending assignments on all the moves generated by the initial bump.)

By interpreting the CBA that a DR cannot be bumped except in layoffs (a reverse spin to *Dairylea*), Local 12 and Goodyear have then applied the CBA in a manner which presumptively is overbroad. On its face the interpretation precludes bumping even when in turn a DR could bump into another position in his or her department (the DR's "area of representation"). The fact that there are many "labor moves" each month at the plant is mostly irrelevant. Whatever bookkeeping is required to process the bumps that might occur following the bumping of a DR is an administrative inconvenience which does not rise to the level of a justification for not applying the Board's Rule against improper superseniority.

Bowers and Talley both worked in, apparently, the engineering department. Presumably Bowers was the third-shift DR (or "a" third-shift DR) in the engineering department. The evidence fails to show that those on the third-shift Bowers could have bumped were outside his department, or outside his "area of representation." Talley testified that the others Bowers could have bumped all worked in the same area as Talley and Bowers, that "They all worked in Division A." (1:20.) Manager Mayfield testified that Talley and Bowers work in "Engineering." (1:96.) Division E Chairman George Booker Jr. testified that by bumping one of the others, Bowers, the DR, would have remained on the third shift, but "in another part of the plant." (1:36.) There is no evidence that "another part of the plant" would have been outside DR Bowers' department and therefore outside his "area of representation."

The record can be viewed as establishing that the others Bowers could have bumped were part of the engineering department. The evidence also can be viewed as inconclusive. The difference is immaterial, for it was the Respondents' burden to establish that the bump of Bowers would have knocked him outside the engineering department, his area of representation, on more than a temporary basis. The evidence failing to show this, I find that the Respondents failed to discharge their burden.

Because Respondents failed to carry their burden, I find that they failed to rebut the General Counsel's prima facie case. I therefore find that Respondents violated the Act as alleged.

CONCLUSIONS OF LAW

1. Since about early July 1991 Respondents Local 12 and Goodyear have accorded superseniority to department representatives (union stewards) other than for retaining a job within their area of representation by interpreting and applying provisions of the 1991–1994 CBA on the basis that DRs may not be bumped for any reason other than layoff.

2. By applying the foregoing interpretation in July 1991, Respondents Local 12 and Goodyear prevented Charging Party James Talley, a more senior third-shift general maintenance mechanic, from bumping into the third-shift ticket position in the cement house, a position held by David Bowers, a less senior third-shift employee, solely because Bowers is a DR, even though Bowers could have remained within his area of representation as a DR by bumping others less senior than he is.

3. By so interpreting and applying the provisions of the CBA, and preventing Talley from taking the third-shift ticket position in the cement house in July 1991, Respondents Local 12 and Goodyear have, respectively, violated Section 8(b)(1)(A) and (2) and Section 8(a)(3) and (1) of the Act.

4. The foregoing unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Offer, retroactive to July 1991, Charging Party James Talley the third-shift ticket position in the cement house (or, if that job no longer exists, a substantially equivalent position) which Talley, with his superior seniority, would have obtained by bumping Department Representative David Bowers. Such retroactive assignment shall be without prejudice to his seniority or any other rights or privileges attendant to the position had Respondents not prevented Talley from bumping DR Bowers by assigning Bowers superseniority based solely on his status as a DR for the Union. A make-whole provision is unnecessary because the General Counsel announced at the hearing (1:100) that Talley has lost no money, only his job and shift preference. By stating that Talley had lost no money, the General Counsel presumably meant that the job pay rates and hours have been the same.

[Recommended Order omitted from publication.]